

Realising Economic and Social Rights beyond Covid-19: The Imperative of International Cooperation

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ABSTRACT

The imperative of international cooperation for realising economic, social and cultural rights (ESCR) has been a largely neglected theme in the theory and praxis of this category of human rights. The current Coronavirus (COVID-19) pandemic has brought to the fore the need to address this major gap. This paper adopts a Third World Approach to International Law (TWAAIL) to deconstruct the dominant nationalist and isolationist approach to realising ESCR in making the case for a paradigm shift to an international cooperation model. The international cooperation model is apt for upholding and advancing human dignity as envisaged by the United Nations human rights system.

SECTION 1: INTRODUCTION

Since the end of the Second World War, no “human crisis” has had such a pervasive, devastating impact on the global landscape as the current Coronavirus (COVID-19) pandemic.¹ Since the World Health Organization (WHO) declared it a pandemic on March 11, 2020,² COVID-19 has not only shaken the global and domestic, public and private health systems, it has also unsettled the economic, social, political, civil, cultural and communal foundations of the world³ with grave implications for human rights. In addition to its significant impact on civil and political rights (CPR) like freedom of movement and association, the coronavirus pandemic has had a grave impact on economic, social and cultural rights (ESCR).

A remarkable aspect of the pandemic is that it does not respect the development status of any country. Analysts have described it as a “public health crisis without precedent in living memory” that has brought “the third and greatest

¹ U.N. Secretary-General, *Shared Responsibility, Global Solidarity: Responding to the Socio-Economic Impacts of COVID-19*, 1, (March 2020).

² WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020, WORLD HEALTH ORG. (March 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [<https://perma.cc/XR5P-GRFN>].

³ United Nations, *Coronavirus ‘Grim Reality: World Economy to Shrink by 3.2 Per Cent, New UN Report Projects*, UN NEWS (May 13, 2020), <https://news.un.org/en/story/2020/05/1064032> [perma.cc/MXW6-QQ52].

economic, financial and social shock of the 21st Century.”⁴ With a fifth of the global population in a lockdown at some point,⁵ the ability of people to secure a means of livelihood,⁶ enjoy an adequate standard of living,⁷ and maintain the highest attainable standard of physical and mental health⁸ have all been significantly impaired. To cushion the effect of the health crisis on these rights, many countries have rolled out emergency legislation and policy measures to contain or minimize its impact within their jurisdiction.⁹

While the various national measures that have been implemented to mitigate the effects of the COVID-19 pandemic are commendable, the globalized nature of the crisis requires global cooperation to achieve sustainable outcomes. The U.N. has declared that there is a need for the comity of nations to address this unprecedented situation with a creative, coordinated, and collaborative response, as “no country will be able to exit this crisis alone.”¹⁰ Therefore, experts in international public policy have noted that “[i]nternational cooperation is indispensable [and] [n]ationalism is not helpful.”¹¹ National inability may be “the nails in the coffin for already frail global governance,”¹² as a nation’s inability to handle the crisis within its territory will have a spiraling global effect. The concerted efforts required to address the COVID-19 pandemic effectively are emblematic of the need to embrace international cooperation for realising ESCR.

This paper adopts Third World Approaches to International Law (TWAIL) to problematize the nationalistic approach to realising ESCR. It makes a case for a paradigm shift from the dominant nationalistic approach to the realisation of ESCR to an international cooperation-based model. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the foremost, binding international legal instrument on ESCR. This model focuses on operationalizing the provisions of ICESCR on international cooperation in the realization of economic, social, and cultural rights.¹³ The

⁴ Org. for Econ. Coop. and Dev. [OECD], *Coronavirus (COVID-19): Joint Actions to win the War*, at 1, (2020), [https://read.oecd-ilibrary.org/view/?ref=119_119674-tbcxotkmhb&title=Coronavirus_\(COVID-19\)Joint_actions_to_win_the_war](https://read.oecd-ilibrary.org/view/?ref=119_119674-tbcxotkmhb&title=Coronavirus_(COVID-19)Joint_actions_to_win_the_war) [https://perma.cc/F2D4-H45T].

⁵ Dominic Gilbert, *Which Countries Are Under Lockdown - and Is It Working?*, THE TELEGRAPH (Apr. 8, 2020), <https://www.telegraph.co.uk/news/0/which-countries-in-lockdown/> [https://perma.cc/6628-8VYH].

⁶ Int’l Covenant on Econ., Soc. and Cultural Rts, art. 6, Dec. 16, 1966, 993 U.N.T.S 3.

⁷ *Id.* at art 11.

⁸ *Id.* at art 12.

⁹ *The Territorial Impact of COVID-19: Managing the Crisis Across Levels of Government*, ORG. FOR ECON. COOP. AND DEV. (Nov. 10, 2020), https://read.oecd-ilibrary.org/view/?ref=128_128287-5agkkojaaa&title=The-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government [https://perma.cc/4Z2S-GG9P].

¹⁰ UN Secretary-General, *supra* note 1.

¹¹ Hans Dembowski, *Two Pronged Global Crisis, Development and Cooperation* (Mar. 21, 2020), <https://www.dandc.eu/en/article/covid-19-requires-global-cooperation-protect-human-health-and-prevent-economic-depression> [https://perma.cc/A9B6-UXMW].

¹² *Id.*

¹³ See Int’l Covenant on Econ., Soc. and Cultural Rts., *supra* note 6, at arts. 2(1), 11(1), 15(4), 23.

provisions of the ICESCR take forward the agenda of the United Nations with specific reference to ESCR. Thus, there will be complimentary references to relevant provisions of the United Nations Charter.¹⁴

The COVID-19 pandemic has shown that the current nationalistic approach is deeply problematic and unsustainable. Interestingly too, the paradigm is antithetical to the historical context of the development of international human rights law. In particular, the establishment of the United Nations and its human rights system at the end of the Second World War, for achieving peace through human rights, strongly supports the case for international cooperation as the model path for realising ESCR. Furthermore, there is a salient normative basis for an international cooperation model as the choice approach to realising ESCR, namely that the obligation of international cooperation is a binding one. The Committee on Economic, Social and Cultural Rights (CESCR), the body of experts responsible for monitoring the implementation of the ICESCR by States parties,¹⁵ has explicated this obligation in various general comments.

The remaining part of the article is set out as follows. Section Two examines the current dominant nationalist, unilateralist approach to ESCR and argues that it does not accord with the normative expectations of the ICESCR. The relationship between TWAIL and ESCR is the focus of the analysis in Section Three, while Section Four presents the argument for setting aside the dominant unilateralist approach to realising ESCR. The focus shifts in Section Five to an evaluation of the jurisprudence of the CESCR on international cooperation and assistance in the ICESCR. Section Six is a TWAIL critique of the current regime for realising ESCR. The conclusion in Section Seven is that it is high time the continued violation of international law, inherent in the neglect of international cooperation for realising ESCR, is abated.

SECTION 2: COVID-19 PANDEMIC, NATIONALIST/UNILATERALIST APPROACH TO ESCR: UNDOING HUMAN DIGNITY

Economic, social and cultural rights (ECSR) are “human rights concerning the basic social and economic conditions needed to live a life of dignity and freedom, relating to work and workers’ rights, social security, health, education, food, water, housing, healthy environment, and culture.”¹⁶ These rights seek to empower human beings with those basic subsistence needs that make life liveable in dignity, as there can be no dignity in joblessness, homelessness, hunger, illiteracy, or sickness.¹⁷ They also “imply a commitment to social integration, solidarity, and equality.”¹⁸

¹⁴ Signed in San Francisco on 26 June 1945.

¹⁵ See Comm. on Econ., Soc. and Cultural Rts., United Nations Hum. Rts. Off. of the High Comm’r, <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx> [<https://perma.cc/J5PF-LLZQ>] (last visited Oct. 15, 2021).

¹⁶ *Introduction to Economic, Social, and Cultural Rights*, ESCR-NET, <https://www.escr-net.org/rights> [<https://perma.cc/CJ5L-K9KX>] (last visited Oct. 15, 2021).

¹⁷ Mashood A. Baderin & Robert McCorquodale, *The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 9* (Mashood A. Baderin & Robert McCorquodale eds., 2007).

As stated earlier, the ICESCR is the foremost binding instrument on ESCR in international law. Articles 6 and 7 of the ICESCR¹⁹ recognize the right to work and the right to enjoy just and favorable conditions of work. According to Article 11 of the ICESCR,²⁰ everyone has a right to an adequate standard of living, “including adequate food, clothing, and housing, and to the continuous improvement of living conditions” and freedom from hunger.²¹ Article 12 confers on everyone the right to enjoy “the highest attainable standard of physical and mental health” and that States parties should take all steps necessary for the prevention, treatment, and control of epidemic, endemic, occupational and other diseases.²² Article 13 of the ICESCR²³ provides that everyone has a right to education which “shall be directed to the full development of the human personality and the sense of its dignity.”²⁴ COVID-19 has affected these and other ESCR across the globe.

The right to healthcare in the current circumstances of a global pandemic arguably best engages the need for international cooperation as imperative in the implementation of ESCR by States parties to the ICESCR. The healthcare facilities in many countries, developed and developing, have been overwhelmed by the pandemic. In the developing nations, there have been reports of a lack of ventilators, oxygen, soap and even running water²⁵ required to combat the pandemic. On the other hand, there are reports that some developed countries are stockpiling such equipment and hoarding medical personnel.²⁶ In particular, these countries negate the CESCR’s position on COVID-19 and the extraterritorial obligations of States.²⁷ The CESCR has also observed that the COVID-19 crisis has adversely affected several economic, social, and

¹⁸ J.K. Mapulanga-Hulston, *Examining the Justiciability of Economic, Social and Cultural Rights*, 6 INT’L J. HUM. RTS. 29, 29-48 (2002).

¹⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 23-24 (Dec. 10, 1948).

²⁰ *Id.* at art. 25.

²¹ Int’l Covenant on Econ., Soc. and Cultural Rts., *supra* note 6, at art. 11. See also Convention on the Rts. of Persons with Disabilities [CRPD] art. 28, Dec. 13, 2006, 2515 U.N.T.S. 2 (“State Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.”).

²² See G.A. Res. 217 (III) A, *supra* note 19.

²³ *Id.* at art. 26.

²⁴ Int’l Covenant on Econ., Soc. and Cultural Rts., *supra* note 6, at art. 13.

²⁵ Ruth Maclean & Simon Marks, *10 African Countries Have No Ventilators: That’s Only Part of the Problem*, NY TIMES (May 17, 2020), <https://www.nytimes.com/2020/04/18/world/africa/africa-coronavirus-ventilators.html> [<https://perma.cc/YG3G-SM6P>].

²⁶ David Hunter, *Coronavirus: There Is No Global South Exceptionalism*, THE CONVERSATION (May 11, 2020, 7:06 AM), <https://theconversation.com/coronavirus-there-is-no-global-south-exceptionalism-137806> [<https://perma.cc/2SD9-9T96>].

²⁷ U.N. Comm. on Econ., Soc. and Cultural Rts., Statement on the Coronavirus Disease (COVID-19) Pandemic and

cultural rights, including the rights to health, food, shelter, and education.²⁸ Furthermore, the U.N. has warned that the COVID-19 crisis risks reversing decades of progress in the fight against poverty and exacerbating already high levels of inequality within and between countries.²⁹

SECTION 3: TWAIL AND ESCR

As the name suggests, Third World Approaches to International Law (TWAIL) is “an expansive, heterogeneous and polycentric dispersed network and field of study.”³⁰ Notwithstanding TWAIL’s heterogeneity, the desire to interrogate the normative underpinning of traditional international law, which they conceive as being designed against the interest of the people of the third world, resonates across the work of TWAIL scholars (TWAILers).³¹ From a TWAIL perspective, the original framing of international law was too Eurocentric to be of any benefit to third-world countries. Thus, it has been observed that international law consisted “of a set of rules with a geographical basis (it was a European law), a religious-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law), and political aims (it was an imperialist law).”³²

Therefore, “TWAIL offers both theories of, and methodologies for, analysing international law and institutions.”³³ According to one scholar, the TWAIL theory “describes a response to a condition, and is both reactive and proactive.”³⁴ It responds to international law as an imperial project while seeking “internal transformation of conditions in the Third World.”³⁵ TWAIL examines international legal rules or legal regimes to determine how they “empower or disempower people in the Third World.”³⁶ TWAILers share an “ethical commitment” to “expose, reform, or even retrench the features of the international system” that creates or sustains an “unequal” and “unjust global order.”³⁷ In this way, TWAIL is “a

Economic, Social and Cultural Rights, ¶ 21, U.N. Doc. E/C.12/2020/1 (April 6, 2020).

²⁸ *Id.* ¶ 1.

²⁹ U.N. Sustainable Dev. Grp., *Shared Responsibility, Global Solidarity: Responding to the Socio-Economic Impacts of COVID-19* (March, 2020), <https://digitallibrary.un.org/record/3856949?ln=en> [<https://perma.cc/M2PB-QRXQ>].

³⁰ James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26 (2011).

³¹ Ibironke T. Odumosu, *Challenges for the (Present/) Future of Third World Approaches to International Law*, 10 INT’L COMM. L. REV. 467, 468 (2008).

³² MOHAMMED BEDJAOU, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 50 (1979).

³³ Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?*, 10 INT’L COMM. L. REV. 371, 377 (2008).

³⁴ Makau Mutua, *What is TWAIL?*, 94 AM. SOC’Y INT’L L. PROC. 31 (2000).

³⁵ *Id.*

³⁶ Antony Anghie, *TWAIL: Past and Future*, 10 INT’L COMM. L. REV. 479, 480 (2008).

³⁷ Obiora Chinedu Okafor, *Newness, Imperialism and International Legal Reform in our Time: A TWAIL Perspective*, 43 OSGOOD HALL L.J. 176, 177 (2005); see also Odumosu, *supra* note 31; Pooja Parmar, *TWAIL: An Epistemological*

political project” with a core objective of reconfiguring international law to “further the interest of the peoples of the Third World,”³⁸ and to “centre the *rest* rather than merely the *west*, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case.”³⁹

International law helps to legitimize and sustain “the unequal structures and processes that manifest themselves in the growing north-south divide.”⁴⁰ From a TWAIL perspective, the current configuration of international law is “predatory” as it “legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West.”⁴¹ This is because the origins of international law lie in the relationships of power between the coloniser and the colonised, and international law has remained a means of perpetrating these relations for hundreds of years.⁴² Thus, a TWAIL perspective seeks to “re-tell, re-write and reconfigure international law by decentering some of its central myths such as its Westphalian origins.”⁴³ It seeks to do so by presenting a counter-hegemonic account to mainstream international theories, practices, and scholarships.⁴⁴ It is thus “an oppositional and transformative set of commitments and ideas for rethinking the international legal order,” and it provides the needed “tools for probing the structural and systemic problems that are constitutive of and foundational to understanding questions of global poverty, wealth, as well as the role of ideals such as rights and policies such as development have played in the third world.”⁴⁵

A TWAIL perspective commends the view that the poor state of ESCR in developing countries implicates international law, and the incongruence is unjustified and inequitable. Western governmental and non-governmental organizations and institutions have maintained keen interests in conducting evaluations of the implementation of ESCR in developing countries. In this regard, reports of the state of ESCR in various parts of the world are a major part of the implementation of the international system’s human rights promotion agenda.⁴⁶ However, compared with such evaluative and reportorial activities, concrete measures on the part of such organizations and institutions for the realisation of ESCR in developing countries remain incongruent and abysmally low.

Inquiry, 10 INT’L COMM. L. REV. 363, 364 (2008).

³⁸ Anghie, *supra* note 36, at 480.

³⁹ Okafor, *supra* note 37, at 177.

⁴⁰ B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT’L COMM. L. REV. 3 (2006).

⁴¹ Mutua, *supra* note 34, at 31.

⁴² Odumosu, *supra* note 31, at 473.

⁴³ James Thuo Gathii, *The Agenda of Third World Approaches to International Law*, in INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS, (Jeffrey Dounoff & Mark Pollack eds., forthcoming 2019), <https://ssrn.com/abstract=3304767> [<https://perma.cc/EA4T-65GS>].

⁴⁴ See generally Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, 15 THIRD WORLD LEGAL STUD. 1, 4 (2000).

⁴⁵ Gathii, *supra* note 43, at 2-3.

⁴⁶ Opeoluwa Adetoro Badaru, *The Right to Food and the Political Economy of Third World States*, 1 TRANSNAT’L HUM. RTS. REV. 1 (2014).

SECTION 4: BEYOND COVID-19: THE CASE FOR INTERNATIONAL COOPERATION FOR REALISING ESCR

The ravaging impact of COVID-19 across the globe has amplified the need to revisit an international cooperation model for realising ESCR. Nonetheless, the need for international cooperation in an international system that is organised around the principle of national sovereignty needs a bit of unpacking; hence, there is a need for a brief discussion of the justifications of international cooperation as the model for realising ESCR.

Historical Justification and Contemporary Reality

The international human rights system was established at the end of World War II, following centuries of slavery and colonialism.⁴⁷ This historical reality, and in particular, the experience of the two world wars, informs the establishment of the United Nations and its human rights system. The preamble to the U.N. Charter declares that the organization was committed to “the dignity and worth of the human person . . . and to promote social progress and better standards of life in larger freedom,” and that it will “employ international machinery for the promotion of the economic and social advancement of all peoples.”⁴⁸ In this regard, international cooperation has a central place in the new global order established post-World War II as “the product of an historical-dialectical process of law-making” which aims to secure “justice and equity.”⁴⁹

From a TWAIL perspective, considering the context from which international human rights emerged, it is an anomaly that unilateral action, rather than international assistance and cooperation, has been the dominant approach to realising ESCR. A nationalistic or unilateral approach to the realisation of ESCR belies the normative underpinning of the rights. Furthermore, the approach also denigrates the experiences of societies and communities that endured slavery and colonialism and the attendant exploitation of their human and material resources. International law scholar Philip Alston recently observed in this regard, “[f]ollowing centuries of colonial exploitation, developing countries continue to be net providers of resources to the rest of the world.”⁵⁰ The prevailing situation of continued large-scale global poverty is incompatible with the human right to an adequate standard of living, the right to life, and the right to live in dignity, all of which are crucial components of ESCR.⁵¹

⁴⁷ See MICHELLE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* (2008).

⁴⁸ U.N. Charter pmb1.

⁴⁹ See Edward McWhinney, *The Concept of Cooperation*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 425, 434 (Mohammed Bedjaoui ed., 1991).

⁵⁰ Philip Alston, *The Parlous State of Poverty Eradication: Report of the Special Rapportuer on Extreme Poverty and Human Rights*, Hum. Rts. Council 16 (July 2, 2020), <https://chrgj.org/wp-content/uploads/2020/07/Alston-Poverty-Report-FINAL.pdf> [<https://perma.cc/E5MK-26SK>].

⁵¹ *Id.* at 14.

In any event, the world has become a global village leading to the interdependence of states.⁵² The “increasing global interdependence has meant that people’s lives are much more influenced by events that take place outside of the country, whether it is spread of disease, depletion of fishing stock, or fluctuations in international financial flows.”⁵³ The continued alienation of the poor, typically developing countries, imperils global wellbeing. Hence, there is the need even in the self-interests of the developed and rich countries to take more than a passing interest in the wellbeing of the poor countries. As the U.N. Secretary-General recently observed, “today’s challenges require a strong commitment to international cooperation and more effective multilateral institutions . . . on all fronts.”⁵⁴

Normative Justification

One of the core goals of the United Nations is the establishment of an international system of human rights as set out in Article 1 of the U.N. Charter. The essence of this provision is that “the frontier between hermetically sealed realms of the inter-State and the intra-State was now seen to be porous.”⁵⁵ Article 55 of the Charter is particularly useful in this regard as it provides firm normative foundations for the ESCR obligations of States (alongside CPR) based on the recognition that fulfilling this category of rights is “necessary for peaceful and friendly relations among nations.”⁵⁶ The Article provides for the U.N. to promote “higher standards of living, full employment, and conditions of economic and social progress and development . . . solutions of international economic, social, health, and related problems; and international cultural and educational cooperation . . . universal respect for, and observance of, human rights and fundamental freedoms for higher standards of living.”⁵⁷

Article 56 then makes it clear that States are committed to fulfilling the obligations set out in Article 55 through “joint and separate action in cooperation with the Organization.”⁵⁸ Since the provisions of the U.N. Charter are “quasi-constitutional” in nature, they are binding on all Member States.⁵⁹ On this account, the combination of Articles 1, 55 and

⁵² See generally DAVID HELD & ANTHONY MCGREW, *THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE* (David Held & Anthony McGrew eds., 2003).

⁵³ Sakiko Fukuda-Parr, *International Obligations for Economic and Social Rights: The Case of the Millennium Development Goal Eight*, in *ECONOMIC RIGHTS: CONCEPTUAL, MEASUREMENT, AND POLICY ISSUES* 301 (Shareen Hertel & Lanse Minkler eds., 2007); see generally Fons Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, 11 *HUM. RTS. L. REV.* 1 (2011).

⁵⁴ U.N. Secretary-General, *Special Edition: Progress Towards the Sustainable Development Goals Report of the Secretary-General* 2019, U.N. Doc E/2019/68 (May 8, 2019).

⁵⁵ Nigel Rodley, *International Human Rights Law*, in *INTERNATIONAL LAW* 783, 787 (Malcolm D. Evans ed., 2010). U.N. Charter art. 55.

⁵⁶ U.N. Charter art. 55.

⁵⁷ *Id.*

⁵⁸ *Id.* at art. 56

⁵⁹ Rodley *supra*, note 55, at 788-89.

56 of the U.N. Charter reinforce the requirement of international cooperation for the realisation of ESCR.

The foregoing critical provisions are not merely hortatory but binding principles of international law,⁶⁰ yet States have largely observed their normative prescriptions in breach with telling consequences. There has been widespread poverty in parts of the world with inadequate food and water, poor basic health care facilities, burgeoning youth unemployment, and widespread poverty and disease.⁶¹ However, the problem is not global scarcity of food, but rather, there is an abundance of food in many western countries with food worth billions of dollars wasted or deliberately warehoused to keep prices up by some developing countries.⁶² The resulting despondence and poverty is a major predisposing factor to conflict and terrorism in many of the affected countries. Even in the compelling circumstances of the COVID-19 pandemic,⁶³ States have privileged national action and unilateral policies for promoting and fulfilling ESCR. Rather than adopt an approach of “global cooperation,” the “hostilities among major powers have raised the specter of global conflict.”⁶⁴

Ironically, there has been a keen interest on the part of governmental institutions and non-governmental organizations of developed countries in statistical, enumerative evaluation of the status of ESCR in developing countries. This enumerative interest accords precedence to identifying and enumerating the deplorable level of economic and social gaps and problems, especially in developing countries, without actively engaging in ameliorating it, but even being actively complicit in maintaining that status quo. However, the absence of ESCR in third world countries should not just be discussed in terms of statistics without looking at the historical, political and economic contexts.⁶⁵ From a TWAIL perspective, such interest lacks positive value for realising ESCR. Rather, it raises concerns about instrumentalizing human rights by such governments and organisations to advance a hegemonic agenda.

⁶⁰ Daniel Aguirre, *Corporate Liability for Economic, Social and Cultural Rights Revisited: The Failure of International Cooperation*, 42 CAL. W. INT’L L.J. 140 (2011).

⁶¹ U.N. Econ. and Soc. Council, *Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights*, ¶ 1, U.N. Doc. EC.12/2021/1 (2020).

⁶² Sen Nguyen, *Coronavirus: Vietnam Stockpiles Rice as Outbreak Spreads and Food Security Concerns Grow*, THIS WEEK IN ASIA: ECONOMICS (Mar. 28, 2020, 10:00 AM), <https://www.scmp.com/week-asia/economics/article/3077272/coronavirus-vietnam-stockpiles-rice-outbreak-spreads-and-food> [<https://perma.cc/ST7H-A4SQ>]. See also Carmen M. Reinhart & Rob Subramanian, *Preventing a COVID-19 Food Crisis*, PROJECT SYNDICATE, (May 15, 2020), <https://www.project-syndicate.org/commentary/governments-must-prevent-covid19-food-crisis-by-carmen-reinhart-2020-05?barrier=accesspaylog> [<https://perma.cc/B7CT-8LFT>].

⁶³ U.N. Dep’t of Econ. & Soc. Affairs, *The Sustainable Development Goals Report*, at 58 (July 7, 2020), <https://www.un.org/en/file/81908/download?token=BfviFhNa> [<https://perma.cc/K6FQ-VANX>].

⁶⁴ Sachs et al., *The Sustainable Development Goals and COVID-19*, in SUSTAINABLE DEVELOPMENT REPORT 13 (2020).

⁶⁵ Opeoluwa Adetoro Badaru, *The Right to Food and the Political Economy of Third World States*, 1 TRANSNAT’L HUM. RTS. REV. 106, 116 (2014).

SECTION 5: ICESCR AND THE JURISPRUDENCE OF THE CESCR ON INTERNATIONAL COOPERATION AND ASSISTANCE

ICESCR

Apart from the quasi-constitutional character of the U.N. Charter, the ICESCR provides for the adoption of a cooperative international approach towards the realisation of ESCR aims. Article 2(1) of the ICESCR provides that:

Each State Party to the present Covenant undertakes to take steps, *individually and through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁶⁶

The provisions of Section 2 of the ICESCR are distinct and deliberate compared, for instance, to its twin convention, the International Covenant on Civil and Political Rights (ICCPR). While Article 2(1) of the ICCPR refers to States' obligations to respect and ensure the rights of all individuals "within its territory and subject to its jurisdiction," Article 2(1) of the ICESCR omits this phrase.⁶⁷ Some have argued that ESCR obligations are essentially national or domestic in nature,⁶⁸ and that "[a] person's home state is certainly the first place to look to in terms of the protection of economic rights – and all other human rights as well."⁶⁹ Nonetheless, the provisions of Article 2(1) of ICESCR on international cooperation show that it has also been the intention of the framers of the ICESCR that realising ESCR especially requires international cooperation and assistance.⁷⁰

The insertion of this international cooperation scheme into the ICESCR expresses a treaty obligation which Article 28 inspired but was unable to couch in binding terms.⁷¹ The obligation is a recognition of the "power differential" that exists between rich and poor countries and "the removal of structural obstacles to the realisation of rights that are themselves a

⁶⁶ Int'l Covenant on Econ., Soc. and Cultural Rts, *supra* note 6, at art. 2(1) (emphasis added).

⁶⁷ MASHOOD BADERIN & ROBERT MCCORQUODALE, ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 75 (Mashood Baderin 2007).

⁶⁸ Fons Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, 11 HUM. RTS. L. REV. 1, 5 (2011).

⁶⁹ SHAREEN HERTEL & LANSE MINKLER, ECONOMIC RIGHTS CONCEPTUAL, MEASUREMENT, AND POLICY ISSUES 267 (2007).

⁷⁰ *Id.* at 273.

⁷¹ YVONNE MCDERMOTT & DAVID KEANE, THE CHALLENGE OF HUMAN RIGHTS: PAST, PRESENT AND FUTURE 12 (2012).

manifestation of the existing power imbalance.”⁷²

The incorporation of the obligation of international cooperation and assistance was deliberate and, indeed contested, during the drafting of the ICESCR. Egypt and India—two prominent postcolonial countries at the table—were vocal about the need to include international cooperation during the drafting of ICESCR. Their representatives argued for the need for international cooperation because “the available resources of the smallest [poorest] countries, even if utilised to the maximum, would be insufficient, [and] as a result, those countries would have to fall back on international cooperation.”⁷³ They argued that international cooperation was of “cardinal importance” to “under-developed countries” to enable them to implement “economic rights.”⁷⁴ Not surprisingly, representatives from Western countries were firmly opposed to this view. A TWAIL perspective directs attention to how that opposition has reflected in the dominant nationalistic/unilateralist approach to realising ESCR.

In addition, Article 11(1) of ICESCR provides that States shall take steps while “recognizing . . . the essential importance of international cooperation based on free consent,” towards the realisation of the right to an adequate standard of living which includes the rights to adequate food, clothing, housing, and water. Similarly, Article 15(4) obliges States, while taking steps to realise the right to cultural life, to “recognize the benefits to be derived from the encouragement and development of international contacts and co-operation.”⁷⁵ Article 22 of the ICESCR also provides that the Economic and Social Council may bring to the attention of the other organs of the United Nations and its specialised agencies the “advisability” of any international measures “likely to contribute to the effective progressive implementation” of the ICESCR.⁷⁶ Lastly, Article 23 provides that States parties shall recognize the importance of international action, methods, meetings, assistance and consultation in the realisation of ESCR.⁷⁷

Further, the *Maastricht Principles on Extraterritorial Obligations of States* provide that international cooperation for fulfilling ESCR forms a critical part of the obligations of States parties. Thus, “[a]s part of the broader obligation of international cooperation, States, acting separately that are in a position to do so, must provide international assistance to contribute to the fulfilment of economic, social and cultural rights in other States.”⁷⁸ A needy State is expected to request

⁷² *Id.* at 26.

⁷³ Sigrun Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* 85 (Intersentia eds. 2008).

⁷⁴ *Id.*

⁷⁵ Int’l Covenant on Econ., Soc. and Cultural Rts, *supra* note 6, at art. 15(4).

⁷⁶ *Id.* at art. 22.

⁷⁷ *Id.* at art. 23.

⁷⁸ ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic Social and Cultural Rights* ¶ 33 (Jan. 2013), https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 [<https://perma.cc/P4EZ-2XVH>].

such assistance or cooperation, which must be considered in good faith by the States to which it is addressed.⁷⁹ This extraterritorial obligation encompasses a State's acts and omissions within or beyond its territory, which have effects on the enjoyment of ESCR outside of that state's territory and obligations of a global character set out in the U.N. Charter and other human rights instruments.⁸⁰ Over the years, the ICESCR has developed considerable jurisprudence on State parties' obligations of international cooperation and assistance for realising ESCR. The next section examines some of that jurisprudence.

Jurisprudence of the CDESCR

The jurisprudence of the CDESCR on the obligation of international cooperation and technical assistance has oscillated between a soft, tentative approach and an intrepid, imperative approach to the obligation of international cooperation for achieving ESCR. In its earliest comments, the CDESCR's jurisprudence was initially tentative and benign in its explication of the nature of international cooperation in the ICESCR—a soft approach. In General Comment No. 1, the CDESCR stated that “international assistance and cooperation,” as provided for in Article 2 of the ICESCR, “may well be required in order to enable some States parties to fulfil the relevant [ESCR] obligations.”⁸¹ It further stated that one of the objectives of the monitoring and reporting process is to enable “the Committee to identify the most appropriate means by which the international community might assist States, in accordance with Articles 22 and 23 of the Covenant.”⁸² Similarly, in General Comment No. 2, the CDESCR stated that in dealing with the debt crisis, “international measures...should take full account of the need to protect economic, social and cultural rights, through inter alia, international cooperation.”⁸³

The soft approach interpretation of the obligation of international cooperation was also evident in the General Comments No. 4, 5 and 6 of the CDESCR. In General Comment No. 4, regarding the right to adequate housing, the CDESCR expressed concern that “[t]raditionally, less than 5 percent of all international assistance has been directed towards housing or human settlements.”⁸⁴ It then called on State Parties to recognise “the essential importance of international cooperation based on free consent” on the issue of housing.⁸⁵ General Comment No. 5 also captures the value of international cooperation with

⁷⁹ *Id.*

⁸⁰ *Id.* ¶ 8.

⁸¹ U.N. Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 1: Reporting by States Parties*, ¶ 3, U.N. Doc. E/1989/22 (July 27, 1981).

⁸² *Id.* ¶ 9.

⁸³ Off. of the High Comm'r for Hum. Rts., Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 2: International Technical Assistance Measures*, ¶ 9, U.N. Doc. E/1990/23 (Feb. 2, 1990).

⁸⁴ Off. of the High Comm'r for Hum. Rts., Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 4: The Right to Adequate Housing*, ¶ 19, U.N. Doc. E/1992/23 (Dec. 13, 1992); see also Off. of the High Comm'r for Hum. Rts., Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 7: The Right to Adequate Housing*, ¶ 18-19, U.N. Doc. E/1998/22 (May 20, 1997).

⁸⁵ *Id.*

respect to the realisation of the ESCR of persons with disabilities, though in less than an affirmative tone: “[I]nternational cooperation in accordance with articles 22 and 23 of the Covenant is likely to be a particularly important element in enabling some developing countries to fulfill their obligations under the Covenant.”⁸⁶

In a similar vein, in General Comment No. 6, the CESCR calls for the expansion of international cooperation on “strategies for reaching the global target on ageing.”⁸⁷ It stated that in accordance with Articles 22 and 23 of the ICESCR, international cooperation “may be a particularly important way of enabling some developing countries to fulfill their obligations under the Covenant.”⁸⁸ Moreover, this soft approach is evident in the CESCR’s consideration of the right to (primary) education. While emphasising that a State cannot use the lack of resources as an excuse to escape its obligation, the CESCR nevertheless highlighted the importance of international cooperation and assistance. In General Comment No. 11, the CESCR stated that references to “international assistance and cooperation” and “international action” in Article 2.1 and Article 23, respectively, of the ICESCR “are of particular relevance Where a State party is clearly lacking in the financial resources and/or expertise required to ‘work out and adopt’ a detailed plan, the international community has a clear obligation to assist.”⁸⁹

However, this soft approach has given way to an intrepid, affirmative interpretation of the ICESCR provisions on the obligations of international cooperation—the imperative approach—in various subsequent General Comments of the CESCR, though the pattern has sometimes been inconsistent. The turn to an imperative approach to States parties’ obligation of international cooperation for fulfilling ESCR started emerging from the CESCR’s General Comment No. 3. The CESCR noted that:

[T]he phrase ‘to the maximum of its available resources’ was intended by the drafters of the Covenant to refer to both the resources existing within a State *and those available from the international community through international cooperation and assistance*. . . International cooperation for

⁸⁶ Off. of the High Comm’r for Hum. Rts., Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 5: Persons with Disabilities*, ¶ 13, U.N. Doc. E/1995/22 (Dec. 9, 1994).

⁸⁷ Off. of the High Comm’r for Hum. Rts., Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, ¶ 7, U.N. Doc. E/1996/22 (Dec. 8, 1995).

⁸⁸ *Id.* ¶ 18

⁸⁹ Off. of the High Comm’r for Hum. Rts., Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 11: Plans of Action for Primary Education*, ¶ 9, U.N. Doc. E/1992/23 (May 10, 1999); see also *id.* ¶ 11 (“Further, in appropriate cases, the Committee encourages States parties to seek the assistance of relevant international agencies, including the International Labour Organization (ILO), the United Nations Development Programme (UNDP), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Children’s Fund (UNICEF), the International Monetary Fund (IMF) and the World Bank, in relation both to the preparation of plans of action under article 14 and their subsequent implementation. The Committee also calls upon the relevant international agencies to assist States parties to the greatest extent possible to meet their obligations on an urgent basis.”).

development and thus for the realization of economic, social and cultural rights *is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.*⁹⁰

In General Comment No. 8, the CESCR asserted the imperative of international assistance and cooperation during a period of sanctions for ameliorating “any disproportionate suffering” by “vulnerable groups” in the “targeted country.”⁹¹ This obligation is imposed on any external entity that is responsible for the country during that period.⁹²

Regarding the right to adequate food, General Comment No. 12 makes elaborate provisions for international cooperation, perhaps because of the essential nature of food. For example, paragraph 36 of the General Comment requires States parties to recognise the “essential role of international co-operation” for “the full realisation of the right to adequate food.”⁹³

In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.⁹⁴

In periods of emergency, each State party should, within its ability, contribute to addressing the needs of victims as “[s]tates have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance . . . including assistance to refugees and internally displaced persons.”⁹⁵

The CESCR also takes this imperative approach to international cooperation in its jurisprudence on the right to health, as elaborated in General Comment No. 14.⁹⁶ Thus, State-parties to the ICESCR are prohibited from imposing embargoes on

⁹⁰ Off. of the High Comm’r for Hum. Rts., Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 3: The Nature of States Parties’ Obligations*, ¶¶ 1, 13-14, U.N. Doc. E/1991/23 (Dec. 14, 1990) (emphasis added).

⁹¹ Off. of the High Comm’r for Hum. Rts., Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, ¶¶ 8-14, U.N. Doc. E/C.12/1997/8 (Dec. 12, 1997).

⁹² *Id.*

⁹³ Off. of the High Comm’r for Hum. Rts., Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 12: The Right to Adequate Food*, ¶ 36, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

⁹⁴ *Id.*

⁹⁵ *Id.* ¶ 38.

⁹⁶ Off. of the High Comm’r for Hum. Rts., Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 14: The Right*

medical supplies and equipment as a political or economic weapon.⁹⁷ The CESCR has also commented that realising the right to sexual and reproductive health requires international cooperation.⁹⁸ Thus, where needy States parties request assistance for realising these rights, those that “are in a position to do so must respond to such requests in good faith and in accordance with the international commitment of contributing at a minimum 0.7 percent of their gross national income for international cooperation and assistance.”⁹⁹ Significantly, the CESCR also warns that donor States should not use international cooperation and assistance as bait to push privatization or emplace “legal, procedural, practical or social barriers” to the enjoyment of the right in the recipient State.¹⁰⁰

With regard to the right to water, the CESCR declared in General Comment No. 15 that Article 2 paragraph 1; Article 11 paragraph 1; and Article 23 of the ICESCR require States parties to “recognize the essential role of international cooperation and assistance and take joint and separate action” for realising the right.¹⁰¹ As with the right to health, there should be no embargoes on water supply as political or economic pressure.¹⁰² Rather, States should “facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required.”¹⁰³ Further, “economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.”¹⁰⁴ The CESCR also adopted the imperative approach to interpreting the provisions of Article 15 of the ICESCR regarding the right to benefit from the protection of the moral and material interests from scientific, literary or artistic production.¹⁰⁵ The CESCR affirmed the

to the Highest Attainable Standard of Health, ¶ 39, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

⁹⁷ *Id.* ¶ 41.

⁹⁸ Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 50, U.N. Doc. E/C.12/GC/22, (May 2, 2016).

⁹⁹ *Id.*; see also *id.* ¶ 37 (“A State party has the duty to establish that it has obtained the maximum available resources, including those made available through international assistance and cooperation, with a view to complying with its obligations under the Covenant.”).

¹⁰⁰ *Id.* ¶ 52; see also *id.* ¶ 53 (“Intergovernmental organizations, and in particular the United Nations and its specialized agencies, programmes and bodies, have a crucial role to play and contribution to make with regard to the universal realization of the right to sexual and reproductive health. . . They should cooperate effectively with States parties, building on their respective expertise in relation to the implementation of the right to sexual and reproductive health at the national level, with due respect to their individual mandates, in collaboration with civil society.”).

¹⁰¹ Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 15: The right to water (arts. 11-12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 30, U.N. Doc. E/C.12/2002/11, (Jan. 20, 2003).

¹⁰² *Id.* ¶ 32.

¹⁰³ *Id.* ¶ 34.

¹⁰⁴ *Id.*

¹⁰⁵ Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 17: The right of everyone to benefit from the*

“essential role” of international cooperation.¹⁰⁶ Significantly, it noted that in accordance with Articles 55 and 56 of the U.N. Charter, “international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States parties and, in particular, of States which are in a position to assist.”¹⁰⁷

The effect of the combined provisions of Article 56 of the U.N. Charter and articles 2.1, 6, 22, and 23 of the ICESCR is that the obligation of international cooperation applies to the right to work. In its General Comment No. 18, the CESCR stated that “States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to work.”¹⁰⁸ According to the CESCR, where a State party is not able to meet its obligations for realising the right to just and favourable conditions of work, “it must seek international assistance.”¹⁰⁹ In such cases, “[e]conomically developed States parties have a special responsibility for, and interest in, assisting developing countries” by providing sustainable, culturally appropriate, and human rights-compliant assistance.¹¹⁰ The CESCR also took a similar line with regard to the role of international cooperation and assistance for realising the right to social security¹¹¹ and the right to take part in cultural life.¹¹²

In sum, the CESCR has oscillated between soft and imperative approaches in its jurisprudence on the international assistance and cooperation obligation in the ICESCR. Nonetheless, the foregoing analysis of its jurisprudence supports the position that nationalist and unilateralist approaches to realising ESCR deviate from the normative prescription of the ICESCR, the pivotal instrument on this category of rights in international law. Further, the prescribed cooperation of the ICESCR is the very essence of international human rights.

Individuals enjoy human rights not because they are members of a particular society, but by simple

protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, (article 15, paragraph 1(c), of the Covenant), ¶ 37, U.N. Doc. E/C.12/GC/17, (Jan. 12, 2006).

¹⁰⁶ *Id.* ¶ 36.

¹⁰⁷ *Id.* ¶ 37.

¹⁰⁸ Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 18: The right to work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 29, U.N. Doc. E/C.12/GC/18, (Feb. 6, 2006). See also Comm. on Econ., Soc. and Cultural Rts., *General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 66, U.N. Doc. E/C.12/GC/23, (Apr. 27, 2016).

¹⁰⁹ Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 23, supra* note 108, at ¶ 67.

¹¹⁰ *Id.*

¹¹¹ Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 19: The right to social security (art. 9)*, ¶ 52, U.N. Doc. E/C.12/GC/19, (Feb. 4, 2008).

¹¹² Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)*, ¶¶ 56-58, U.N. Doc. E/C.12/GC/21, (Dec. 21, 2009).

virtue of their humanity. . . The entire premise behind all international human rights instruments is that Swedes are not only concerned with the wellbeing of other Swedes, and Nigerians are not solely concerned with the wellbeing of other Nigerians, and so on. Rather, in becoming a party to an international human rights treaty, the Nigerian government and the Nigerian people are proclaiming (legally and otherwise) that they are also concerned with the wellbeing of Swedes, as well as nationals of all other countries.¹¹³

SECTION 6: ESCR AND INTERNATIONAL COOPERATION: A TWAIL CRITIQUE

International cooperation is imperative for realising ESCR. While the spirit of the ICESCR already commends such a view, the CESCR has given it normative affirmation in the face of the COVID-19 pandemic. It is relevant to note that in its public statement on the COVID-19 pandemic, the CESCR stated that the global crisis brings to the fore the “crucial importance” of international assistance and cooperation as a core principle of the ICESCR.¹¹⁴ It stated further that international cooperation and assistance envisaged in the circumstances include:

[T]he sharing of research, medical equipment and supplies, and best practices in combating the virus; coordinated action to reduce the economic and social impacts of the crisis; and joint endeavours by all States to ensure an effective, equitable economic recovery. The needs of vulnerable and disadvantaged groups as well as fragile countries, including least developed countries, countries in conflict and post-conflict situations, should be at the centre of such international endeavours.¹¹⁵

Regarding human centrality, “dignity and human rights belong to a person as a member of a human society and not because of their special political connection with any state.”¹¹⁶ It is thus important that the international system adopt a cooperative, global model that would ensure that the ESCR needs of those in rich and poor countries are not compromised. Such cooperation may come in different shades, but such shades should resonate with the U.N. Secretary-General’s recent statement that

whole societies must come together. Every country must step up with public, private and civic sectors collaborating from the outset. But on their own, national-level actions will not match the global scale and complexity of the crisis. . . Given the world’s extensive economic and social interrelationships and trade—we are only as strong as the weakest health system.¹¹⁷

From a TWAIL perspective, rich countries should not view international cooperation for realising ESCR across the globe

¹¹³ HERTEL & MINKLER, *supra* note 69, at 273.

¹¹⁴ U.N. Econ. and Soc. Council, Comm. on Econ., Soc. and Cultural Rights, *supra* note 27, at ¶19.

¹¹⁵ *Id.*

¹¹⁶ Elena Pribytkova, *What Global Human Rights Obligations Do We Have?*, 20 CHI. J. INT’L L. 386, 392 (2020).

¹¹⁷ U.N. Secretary-General, *supra* note 1, at 1.

and, in particular with reference to developing countries, as a gratuitous aid or charity. Rather, it is a treaty obligation deliberately crafted in the light of historical experience to institute global equity. Thus, international assistance and cooperation is a matter of entitlement to social arrangements, whereby poor countries assert a right to be helped because they lack the necessary resources. This is because the “design of the economic order contributes to the perpetuation of world poverty”¹¹⁸ and “historical injustices, including genocide, colonialism, and slavery, play a role in explaining” the poverty of the poor nations and wealth of the rich ones.¹¹⁹ Thus, the predicaments of such poor countries can be traced, in part at least, to historical injustices that have transformed into structural inequities in the national experiences of those countries. Moreover, the structural injustices have become entrenched by international policies and are reflected in systemic lop-sidedness in global governance.¹²⁰

TWAILers are able to foreground international cooperation for realising ESCR on several bases. First, and as seen above, the UN Charter and ICESCR provisions, as well as the CESCJ jurisprudence, expressly valorize an international cooperation model for ESCR realisation. For example, Article 2(1) of ICESCR requires States Parties “to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.”¹²¹

On the other hand, there is no express mention of international cooperation in the ICCPR. Article 2(1) of the ICCPR simply provides that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.” Thus, there is a major distinction between the obligations created by each of these implementation provisions. Article 2(1) of the ICCPR delimits State Party obligation for realising civil and political rights to the national jurisdiction. The contrary is the case with the obligation for realising ESCR as set out in Article 2(1) of the ICESCR. This is very important when considering these two implementation and obligation provisions, as that both sets of rights were initially part of the same instrument and came into operation simultaneously.

The express mention of international assistance and cooperation in the ICESCR was a deliberate move to take the realisation of ESCR beyond national institutions and resources. The fact that Articles 1 through 3 of both ICESCR and ICCPR contain virtually the same provisions, with the notable difference being the specific provisions on international cooperation and assistance, and progressive realisation, present only in the former, reinforces that position. Further, during the debates on the ICESCR, there was a firm argument by representatives of some developing countries that, even if those countries were to deploy all their national resources, they still would not be able to meet their ESCR obligations. Hence

¹¹⁸ THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* 1 (2008).

¹¹⁹ Thomas Pogge, *Priorities of Global Justice*, 32 *METAPHILOSOPHY* 6, 14-15 (2001).

¹²⁰ Fukuda-Parr, *supra* note 53, at 293-94.

¹²¹ Int’l Covenant on Econ., Soc. and Cultural Rts., *supra* note 6, at art 2.

the need for international assistance and cooperation.¹²² Exceptions to the principle of sovereignty have been focused on the prevention and punishment of violations of civil and political rights. The international system has been keen to provide humanitarian assistance to areas that have experienced catastrophes like starvation but “has also been very slow to adjust to the fact that in the [social and economic] realm, the implications of globalization are immense, seriously affecting the power of states to relieve the SE concerns of their populations.”¹²³

Furthermore, it is ironic that in practice, civil and political rights have been the major subject and focus of international interest, cooperation, and assistance rather than the ICESCR. This is notwithstanding the clear divergence in the ICESCR and ICCPR in the stipulation and non-stipulation of the obligation of international cooperation, respectively. Individually and collectively (through regional bodies like the E.U., for instance), western, developed countries are swift and deliberate in their interventions on national affairs of other countries—especially developing ones—on the platform of protecting civil and political rights, but not ESCR. In such interventions, the sovereignty of those other countries is largely relegated.

Western, developed countries, in particular, have often used the provisions of Articles 51, 55, and 56 of the U.N. Charter on international cooperation to intervene in the political and governance space of other countries, under the guise of protecting the civil and political rights of the citizens of those other countries. For example, despite the fact that several condemnations had trailed the invasion of Iraq for want of the requisite Security Council resolution before the invasion,¹²⁴ key developed countries that were involved in the invasion referred to the provisions of Article 42¹²⁵ of the U.N. Charter, and previous resolutions of the Security Council, to justify the military action. With particular reference to the U.S., it was reported that “[t]he impression we obtained from those with whom we discussed . . . was that, instead of establishing first whether military action would be legal, the U.S. would act first and then use international law to defend its action retrospectively if it were possible to do so.”¹²⁶ It is thus an anomaly that the western countries have devised exceptions to the principle of sovereignty to protect civil and political rights while neglecting to activate the existing international norms to facilitate the realisation of ESCR.

It is equally interesting to note that the Human Rights Committee (HRC) has stated in its exposition of Article 2 of the ICCPR that States parties are under obligation to realise the civil and political rights of only those within their

¹²² Roland Burke, *Some Rights Are More Equal than Others: The Third World and the Transformation of Economic and Social Rights*, 3 HUMAN. J. 427, 433 (2014).

¹²³ Ruth Gavison, *On the Relationship between Civil and Political Rights, and Social and Economic Rights*, in THE GLOBALIZATION OF HUMAN RIGHTS 23, 49 (Jean-Marc Coicaud et al. eds., 2003).

¹²⁴ For a critique of the illegality of the invasion, see Gerry Simpson, *The War in Iraq and International Law*, 6 MELB. J. INT’L L. 167 (2005).

¹²⁵ U.N. Charter art. 42, ¶ 1. (Empowering the Security Council to “take such action as may be necessary to maintain or restore international peace and security.”).

¹²⁶ SELECT COMMITTEE ON FOREIGN AFFAIRS, Foreign Affairs - Seventh Report, 2001-2, HC 384, ¶ 221 (UK).

jurisdictions or under their effective control.¹²⁷ On the other hand, the closest elucidation to international cooperation and assistance in relation to the ICCPR is to the effect that “States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.”¹²⁸ This elucidation does not provide the normative and jurisprudential support for international cooperation of the high level embodied in the clear provisions of the ICESCR and the jurisprudence of the CESCR.

The privileging of civil and political rights does not reflect the normative commitments that developed countries and the international community made under the ICESCR.¹²⁹ Equal application of international cooperation helps address the “unequal structures and processes that manifest themselves in the growing north-south divide.”¹³⁰ Since international law cannot be separated “from the production, organisation and re-organisation of our material world, as well as from our political, economic and social realities,”¹³¹ it is only reasonable that the normative value of international cooperation, as embedded in the ICESCR and CESCR jurisprudence, are taken seriously.

Historically, there was a deep-rooted Western opposition to the realisation of ESCR in western, capitalist countries. Writing about the Western opposition to the inclusion of ESCR in the global human rights regime, international law expert Antonio Cassese observes that

[t]he West proposed proclaiming at the world level only the civil and political rights . . . It was only in a second stage, given the hostility of the Socialist countries and under strong pressure from the Latin Americans . . . that the West agreed to incorporate . . . a number of economic and social rights as well.¹³²

¹²⁷ See Hum. Rts. Comm. Eightieth Session, ¶ 10, CCPR/C/21/Rev.1/Add. 1326 (2004) (“States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”).

¹²⁸ *Id.* ¶ 18.

¹²⁹ Ralph Wilde, *Socioeconomic Rights, Extraterritorially*, in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 6 (Eyal Benvenisti & Georg Nolte eds., 2018).

¹³⁰ Chimni, *supra* note 40, at 4.

¹³¹ Luis Eslava, *The Materiality of International Law: Violence, History and Joe Sacco's the Great War*, 5 LONDON REV. INT'L L. 49, 80 (2017).

¹³² ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD 35 (1990). But see Daniel J. Whelan & Jack Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight*, 29 HUM. RTS. Q. 908, 911 (2007) (“Western commitments to economic and social rights were internally generated long before the end of World War II. Other states certainly supported economic and social rights. None, however, did so with more genuine commitment or greater actual impact than the United States and Great Britain, the two leading Western

The same was noted with regard to the inclusion of ESR in the Universal Declaration of Human Rights (UDHR).¹³³ This set the stage for the lackluster attitude towards deploying international cooperation and assistance to realising ESCR. It perpetuates the privileging of certain rights and their imposition on people who arguably face more stark deprivations that demean their basic human dignity. TWAIL is committed to using history “to understand the untold truths and social functions of international law,”¹³⁴ and on this account, the pro-civil and political rights posture raises concerns about double standards.

If indeed the international community and developed countries are serious about the international cooperation mechanism under the U.N. Charter, they have no justifiable reason to restrict international intervention to ICCPR-implicated rights. Rather, the international community should invoke the same provisions of the U.N. Charter to provide the ESCR needs for the people of the developing countries. On the other hand, the fact that there are specific international cooperation provisions in the ICESCR beyond the general provisions in the U.N. Charter, coupled with the CESCR jurisprudence, further commends an argument for rethinking the international human rights commitment of the developed countries when dealing with developing countries.

Some developed countries have stated that the nature of certain threats crosses borders, justifying international cooperation for combating them.¹³⁵ Such cooperation needs to extend to address ESCR challenges, one of the root causes of terrorism and allied global problems. From the empirical, normative, historical, and contemporary points of view, there is a sound case for unleashing international cooperation and assistance from its current state of inertia in relation to the realisation of ESCR.

Moreover, the continued virtual non-implementation of the relevant provisions on international cooperation and assistance for realising ESCR amounts to a gross violation of international law. Obligations of state parties are rooted in the provisions of the Vienna Convention on the Law of Treaties (Vienna Convention).¹³⁶ The developed countries’

powers.”); *cf.* Public Papers and Addresses of Franklin D. Roosevelt, 10 Pub. Papers 315 (1950).

¹³³ LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 191 (1995); Gavison, *supra* note 123, at 54 n.46; but *cf.* Whelan & Donnelly, *supra* note 132, at 910 (arguing that there was a concern on the part of western countries about the mechanics of implementing those rights). Whelan and Donnelly’s argument has since been challenged. See, e.g., Susan L. Kang, *The Unsettled Relationship of Economic and Social Rights and the West: A Response to Whelan and Donnelly*, 31 HUM. RTS. Q. 1006, 1006-29 (2009).

¹³⁴ Ntina Tzouvala, *TWAIL and the “Unwilling or Unable” Doctrine: Continuities and Ruptures*, in 109 AJIL UNBOUND 266, 267 (2016).

¹³⁵ North Atlantic Treaty Organization, *10 things you need to know about NATO*, (Sept. 16, 2020), <https://www.nato.int/cps/en/natohq/126169.htm#:~:text=Collective%20defence%3A%20The%20North%20Atlantic,and%20territory%20of%20its%20members> [https://perma.cc/Z8HG-Z6Y6].

¹³⁶ Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

application of international cooperation to ICCPR provisions without an equal application to the ICESCR is selective and constitutes a violation of Article 26 of the Vienna Convention. Article 26 requires states to give effect to treaty obligations in good faith.

The current situation further confirms that international law is skewed against developing countries. From a TWAIL perspective, the “origins of international law were rooted in empire and injustice against distant peoples.”¹³⁷ Contemporary workings of international law continued like that in many respects.¹³⁸ Neglect from rich, western countries to operationalize fundamental provisions of key international treaties like those on international cooperation reflects the continued rendering of international law as a hegemonic project. It should be noted that international cooperation for realising economic and social rights is designed specifically to address centuries of structural injustices resulting from slavery and colonial imposition from which virtually all the rich western countries have benefitted.

In any event, factors such as physical externalities, demonstration effects, diaspora externalities, and mobility,¹³⁹ which usually inform the concern and commitment of other states to the civil and political rights situation in another state, can also serve as valid justifications for activating international commitment and cooperation towards ESCR realisation. For example, just as a violation of civil and political rights “may create conditions that would result in civil war or a threat to international peace and security,”¹⁴⁰ violations of people’s ESCR may also have adverse effects on global peace.”¹⁴¹ Reducing severe poverty abroad is not easy, of course, but it is generally much easier than reducing violence abroad.”¹⁴¹

SECTION 7: CONCLUSION

Operationalizing the neglected human rights treaty provisions on international cooperation for realising economic, social and cultural rights provides a veritable handle for mitigating and managing a global crisis as brought about by the current COVID-19 pandemic. Developed countries cannot justify applying U.N. Charter provisions to civil and political rights in developing countries while ignoring the ICESCR’s provisions on international cooperation in those same countries. There is a need to call time-out on the practice of maintaining two distinct normative orders in the workings of international law.¹⁴² The U.N. Charter, the ICESCR, and the CESCR jurisprudence recognize international cooperation in realising ESCR. Arguably, it has become a part of international law. Noncompliance is tantamount to a violation of the law. The international community should focus on how to best deploy the existing normative and jurisprudential architecture on international cooperation, with an emphasis on helping people in the developing countries meet their ESCR needs. This approach would help the international law or legal system purge itself from being an order that was orchestrated by

¹³⁷ JOHN LINARELLI ET AL., *THE MISERY OF INTERNATIONAL LAW; CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY 2* (2018).

¹³⁸ Odumosu, *supra* note 31, at 468-69.

¹³⁹ JP TRACHTMAN, *THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT 123-24* (2013).

¹⁴⁰ *Id.* at 123.

¹⁴¹ Pogge, *supra* note 119, at 4.

¹⁴² *Id.* at 5.

powerful states as an instrument of their power deployed onto less powerful states.¹⁴³ Indeed, there is a need to “distinguish between the international law of ‘coexistence,’ governing essentially diplomatic inter-state relations, and the international law of cooperation, expressed in the growing structure of international organisation and the pursuit of common human interests.”¹⁴⁴

¹⁴³ Muthucumaraswamy Sornarajah, *Power and Justice in International Law*, 1 SING. J. OF INT’L & COMP. L. 28 (1997).

¹⁴⁴ WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* vii (1964).